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No. 00-1925

In the Supreme Court of the United States

CONSOLIDATED DEVELOPMENT CORPORATION, ET AL.,

Petitioners,

v.

SHERRITT, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly found that the district court could not, consistently with the due process clause, exercise general personal jurisdiction over the respondents, because the respondents lacked the "continuous and systematic" general business contacts with the United States necessary under *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445 (1952), and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

RULE 29.6 STATEMENT

Respondent Viridian Inc., formerly known as Sherritt Inc., is a wholly-owned subsidiary of Agrium Inc., a publicly-held corporation whose shares are traded on the Toronto Stock Exchange. Respondent Canada Northwest Energy Ltd. is a wholly-owned subsidiary of Viridian Inc. Respondent Sherritt International Corporation is a publicly-held corporation whose shares are traded on the Toronto Stock Exchange. Sherritt International Corporation has a 50-percent interest in respondents Cobalt Refinery Company Inc., International Cobalt Company Inc., and Moa Nickel, S.A. The other 50-percent interest in each of these latter three respondents is owned by defendant General Nickel, S.A., an instrumentality of the Government of Cuba. Except as noted above, respondents are not aware of any publicly-held company or parent corporation holding 10 percent or more of the shares of any of the respondents.[1]

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[1] The ownership interests of certain of the respondents were incorrectly stated in the July 5, 2000 opinion of the court of appeals below. Pet. App. 3a-4a. The court corrected these statements in its order of March 30, 2001. Pet. App. 19a-21a.

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JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioners contrive a conflict between the decision below and *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), by eliding the well-established distinction between general and specific personal jurisdiction. That distinction has been articulated in several decisions of this Court and has been carefully and consistently applied by the courts of appeals, as it was by the Court of Appeals for the Eleventh Circuit below. Nothing in the Eleventh Circuit's application of the law or its consideration of the facts raises an issue worthy of review by this Court.

STATEMENT

Petitioners are two U.S. corporate affiliates, Consolidated Development Corporation and Consolidated Cuban Oil & Gas Rights Corporation (collectively, "Consolidated"). Consolidated alleges that its oil and gas concessions in Cuba were expropriated by the Government of Cuba in 1959. Pet. App. 2a. In 1996, Consolidated brought suit in the District Court for the Southern District of Florida not only against the Republic of Cuba and four of its instrumentalities but also against the six defendants referred to collectively in the court of appeals decision as "the Canadian defendants": two Canadian corporations, Viridian Inc. (f/k/a Sherritt Inc.), and Sherritt International Corporation ("Sherritt International"); one affiliate of Viridian, Canada Northwest Energy Ltd. ("CNW"), a Canadian corporation; and three affiliates of Sherritt International: The Cobalt Refinery Company Inc. ("Corefco"), a Canadian corporation; International Cobalt Company Inc. ("ICCI"), a Bahamian corporation; and Moa Nickel, S.A. ("Moa Nickel"), a Cuban corporation. Pet. App. 2a, 20a-21a.[2]

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[2] The district court eventually dismissed Consolidated's claims against the Government of Cuba, Pet. App. 8a, and it is not clear that

Consolidated made no allegations that any of the Canadian defendants had anything to do with the alleged 1959 expropriation. Rather, the gravamen of the complaint was that during the 1990s one or more of the Canadian defendants received from the Government of Cuba the right to explore and exploit some of the same oil and gas properties in which Consolidated had held concessions over 30 years earlier. Pet. App. 2a, 5a.

In the district court, each of the Canadian defendants moved to dismiss the complaint on two grounds: (1) lack of personal jurisdiction; and (2) failure to state a claim on which relief could be granted, based on the act of state doctrine. Pet. App. 5a-6a. One senior executive of each of the Canadian defendants provided a declaration in support of his company's motion to dismiss for lack of personal jurisdiction. Pet. App. 6a. At Consolidated's behest, the district court permitted Consolidated to take depositions of these executives for the purpose of developing information on the issue of personal jurisdiction. *Ibid.*

Following Consolidated's jurisdictional discovery, the district court dismissed the Consolidated complaint, addressing not the jurisdictional issue but instead the failure to state a claim. Pet. App. 22a-37a. The district court concluded that the act of state doctrine precluded consideration of Consolidated's complaint, because "adjudication of [Consolidated's] claims [would] require[ ] the Court to declare the expropriation by the Cuban government of [Consolidated's] oil concessions in Cuba invalid." Pet. App. 26a. After an extensive review of the act of state doctrine, the court held that Consolidated's case collided

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service of process was ever effectuated against the other Cuban defendants, Pet. App. 7a.

with "well-established precedent" and "must be dismissed." Pet. App. 37a.[3]

Consolidated appealed to the Eleventh Circuit. Concluding that the district court lacked personal jurisdiction over the Canadian defendants, the court of appeals affirmed on jurisdictional grounds the lower court's dismissal. Pet. App. 1a-18a; *see* Pet. App. 19a-21a (court of appeals order correcting certain statements in its opinion regarding the ownership interests of the Canadian defendants).

The court of appeals noted that Consolidated relied on Rule 4(k)(2) of the Federal Rules of Civil Procedure as the basis of personal jurisdiction over the Canadian defendants. Pet. App. 9a. Rule 4(k)(2) permits a court, where a defendant is not subject to the jurisdiction of the courts of general jurisdiction of any state, to aggregate the defendant's nationwide contacts so as to permit service of process if two conditions are met: (1) the plaintiff's claims must "arise under federal law"; and (2) the exercise of jurisdiction must be "consistent with the Constitution and laws of the United States." Fed. R. Civ. P. 4(k)(2). The court of appeals did not reach the issue whether Consolidated's claims met the first condition, because it found that the second condition was not satisfied. Pet. App. 9a.[4]

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[3] Following the district court's decision, and its entry of judgment in favor of each of the Canadian defendants, the president of both corporate plaintiffs, Alberto Diaz Masvidal, moved to intervene in the case. Pet. App. 8a. The motion was denied and Dr. Masvidal appealed. His appeal was consolidated with the appeal of the two corporate plaintiffs. The court of appeals affirmed the district court's denial of the motion to intervene, Pet. App. 3a, and that affirmance is not contested in the petition for writ of certiorari.

[4] Accordingly, even if the court of appeals had found sufficient contacts by the Canadian defendants with the United States to satisfy the due process requirements of Rule 4(k)(2), it could have sustained the district court's dismissal on other grounds, either the lack of a federal cause of action (the first condition for Rule 4(k)(2)

At the outset of its jurisdictional analysis, the court of appeals drew the distinction between specific and general jurisdiction. Noting that jurisdiction "consistent with the Constitution and laws of the United States" entails the due process requirement that a non-resident defendant have certain minimum contacts with the United States, the court observed that "the nature and quality of these contacts . . . vary depending upon whether the type of personal jurisdiction being asserted is specific or general." Pet. App. 10a. Specific jurisdiction applies where the cause of action arises directly from the defendant's activities in the forum. In such cases, the defendant's "conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *Ibid.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (internal quotation marks omitted)). By contrast, general jurisdiction is implicated where the cause of action does not arise directly from the defendant's activities in the forum. For a court to exercise general personal jurisdiction, due process requires that the plaintiff demonstrate that the defendant has "continuous and systematic general business contacts" in the forum. Pet. App. 11a. (citing *Helicopteros*, 466 U.S. at 412-413; *Perkins*, 342 U.S. at 438).

The court of appeals found it "clear" that the "applicable due process requirements" in the instant case were those of general jurisdiction. Pet. App. 11a. It was not the activities of the Canadian defendants in the United States that gave rise to Consolidated's complaint but their alleged "conversion" in Cuba of Consolidated's allegedly expropriated oil and gas concessions. Indeed, after reviewing the record and considering the supplemental memorandum on jurisdiction submitted by Consolidated to the district court following its jurisdictional discovery, Pet. App. 6a, and after "question[ing] closely" Consolidated at oral argument, Pet. App. 11a, the court of appeals found only three contacts of the Canadian defendants

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jurisdiction) or the applicability of the act of state doctrine.

with the United States, all by Viridian: (1) in 1993 and 1994 (three and two years before the filing of the litigation), Viridian issued bonds and debentures in the United States; (2) Viridian appointed an agent for service of process in the United States with respect to those two offerings; and (3) Viridian marketed fertilizer and chemicals in the United States through a subsidiary that had its own directors and officers, its own bank accounts and offices, its own employees, and its own pricing and marketing practices. Pet. App. 12a, 16a. Finding these "limited and sporadic connections with the forum" insufficient to constitute the continuous and systematic general business contacts required for the exercise of general jurisdiction, Pet. App. 12a-13a, the court held that the district court lacked jurisdiction over Viridian, Pet. App. 16a.

With respect to the other Canadian defendants, the basis for general jurisdiction was truly vaporous. The court of appeals noted that the record revealed no contacts in the United States by Sherritt International and its three affiliates, Corefco, ICCI, and Moa Nickel. Pet. App. 17a. At oral argument, Consolidated conceded that these four respondents "have never done any business in the United States." Pet. App. 16a-17a.

As for the lone remaining respondent among the Canadian defendants, CNW, the court noted that Consolidated had "conceded that [CNW] currently has no operations at all, in this country or elsewhere." Pet. App. 17a. CNW had had subsidiaries in the United States with oil, gas, or geothermal leases, but all but one of these subsidiaries had been liquidated four years before the litigation was filed, and the remaining U.S. subsidiary owned only a dormant geothermal lease. *Ibid.* "These contacts are so inconsequential," the court held, "that they cannot possibly support the district court's assertion of general personal jurisdiction over CNW." *Ibid.* Accordingly, the court held that the district court lacked jurisdiction over all six of the Canadian defendants and affirmed the dismissal of the case. Pet. App. 18a.

REASONS FOR DENYING THE PETITION

1. The decision below rests on a routine application of this Court's established personal jurisdiction jurisprudence. In its petition, Consolidated makes no claim that the decision below is in conflict with the decisions of any other federal court of appeals or of the highest court of any State. Rather, Consolidated claims that the Eleventh Circuit's decision "cannot be squared" with *Weltover*, and that review is necessary to "provide authoritative guidance" to lower courts on "the contours of the Fifth Amendment Due Process Clause as incorporated in Rule 4(k)(2)." Pet. 16. In its Supplemental Brief, Consolidated announces a "direct conflict" between the Eleventh Circuit's decision in the present case and the Seventh Circuit's decision in *ISI International, Inc. v. Borden Ladner Gervais LLP*, No. 99-1815, 2001 WL 747642 (7th Cir. July 2, 2001). Supp. Brief at 1. None of these reasons for granting the petition is sound.

a. First, the court of appeals' decision is not at odds with *Weltover*. In *Weltover*, the plaintiffs alleged that the Republic of Argentina had breached contractual obligations to be performed in the United States when it rescheduled interest payments on bonds, payments that were supposed to be made in New York. The issue before this Court was whether Argentina was subject to the jurisdiction of the courts of this country under the "commercial activity" exception to the Foreign Sovereign Immunities Act. That exception authorizes jurisdiction if the foreign sovereign engaged in commercial activity that had a direct effect in the United States. Argentina argued that the "direct effect" requirement must be construed to embody the "minimum contacts" test used to determine whether the exercise of jurisdiction comports with due process. It conceded that the question "whether there is a constitutional basis for personal jurisdiction over Argentina is not before the Court as an independent question." 504 U.S. at 619 n.2 (internal quotation marks and alterations omitted). In a single sentence, this Court held that due process was satisfied because,

"[b]y issuing negotiable debt instruments denominated in United States dollars and payable in New York and by appointing a financial agent in that city, Argentina purposefully availed itself of the privilege of conducting activities within the United States." *Id.* at 619-620 (internal quotation marks and alterations omitted).

Because the debt instruments were the very subject of the *Weltover* litigation, the form of personal jurisdiction applicable in that case was specific jurisdiction, not general jurisdiction. By contrast, as the Eleventh Circuit explained, the exercise of personal jurisdiction in the present case must satisfy the standards for general jurisdiction. Consolidated's claims against the Canadian defendants arose from the alleged use of oil and gas concessions *in Cuba*. Consolidated's complaint did not rest on any contractual or other obligations to be performed in the United States by any of the Canadian defendants. That one of the Canadian defendants, Viridian, had issued bonds and debentures in the United States in years prior to Consolidated's lawsuit, "had absolutely nothing to do with" any cause of action alleged in Consolidated's complaint. Pet. App. 13a. Accordingly, the claim of a conflict with *Weltover* is fanciful.[5]

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[5] Consolidated makes no claim of a conflict with any of this Court's general jurisdiction cases. Nor could it. In *Helicopteros*, this Court expressly rejected the exercise of general jurisdiction by the Texas courts, although the defendant (a Colombian corporation) had negotiated a multimillion dollar contract in Texas, had purchased 80 percent of its helicopter fleet from a Texas manufacturer over a seven-year period, had sent its chief executive officer to Texas to negotiate a sales contract, and had sent pilots and others to Texas for training sessions. 466 U.S. at 410-411, 414. The Canadian defendants' contacts were far less continuous and systematic than those of the *Helicopteros* defendant. Accordingly, as the Eleventh Circuit concluded, the contention that the courts of this country may exercise general jurisdiction over the Canadian defendants cannot be squared with this Court's precedents.

b. Second, the lower courts have encountered no difficulty in mapping the "contours of the Fifth Amendment Due Process Clause as incorporated in Rule 4(k)(2)." Pet. 16. Indeed, many of the cases cited by Consolidated in its petition reflect the lower courts' sure grasp of the distinction between specific and general jurisdiction in the context of Rule 4(k)(2).[6] No uncertainty, confusion, or conflict among the circuits is to

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[6] *See, e.g., BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 258-263 (3d Cir. 2000) (noting distinction between general and specific jurisdiction under Rule 4(k)(2), court finds that neither basis of jurisdiction applies where only contacts with United States were placement of orders in Taiwan for U.S.-sourced equipment, sending correspondence to United States, and agreeing in one contract to arbitrate disputes in New York); *Submersible Sys., Inc. v. Peforadora Central, S.A.*, 249 F.3d 413, 420 (5th Cir. 2001) (since "case does not arise out of [defendant's] contacts with the United States" but rather with Mexico, defendant's "contacts with the United States must be[ ] 'continuous and systematic' to have allowed the district court to take jurisdiction" under Rule 4(k)(2)); *In the Matter of an Application to Enforce Administrative Subpoenas Duces Tecum of the Securities & Exch. Comm'n v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996) (distinction between general and specific jurisdiction noted; where defendant's contacts with United States "involve activities that are the very source of the SEC's interest in the two corporations" of which defendant was president, those contacts "support the exercise of specific jurisdiction" under Rule 4(k)(2)); *Associated Transp. Line, Inc. v. Productos Fitosanitarios Proficol el Carmen*, S.A., 197 F.3d 1070, 1074, 1075 (11th Cir. 1999) (in determining jurisdiction under Rule 4(k)(2), court examines whether any contact "giving rise to [plaintiff's] claim" suffices to support jurisdiction and then, finding that it does not, court examines whether any contact unrelated to the litigation is so "pervasive" as to satisfy a "general jurisdiction" standard); *cf. Doe v. Unocal Corp.*, 248 F.3d 915, 922-931 (9th Cir. 2001) (finding no jurisdictional grounds under Rule 4(k)(2) by reason of corporation's promotion of sales of its stock in the United States, court analyzes specific and general jurisdiction under California's long-arm statute instead).

be found in these cases, and Consolidated identifies none in its petition.

c. Nor does the Seventh Circuit's recent decision in *ISI International* disturb the peace among the circuits. In that case, the foreign defendant was sued for its activities in the United States: its mailing of false and misleading correspondence to California and its engagement of a Michigan law firm to file and then abandon patent applications in the United States. 2001 WL 747642, at *2, *3. *ISI International*, in short, is a garden-variety specific jurisdiction case that neither illuminates nor alters the jurisprudence of general jurisdiction.

2. At bottom, what Consolidated would have this Court do is reexamine the record already searched by the Eleventh Circuit, in the hope that this Court will find dispositive jurisdictional contacts undiscovered by the court of appeals. The Eleventh Circuit examined the allegations in the complaint, the declarations and depositions of the Canadian defendants, the jurisdictional memorandum filed by Consolidated, and the representations by Consolidated in open court. Pet. App. 11a-12a, 15a-18a. After a careful "review of the record," Pet. App. 12a, the court of appeals concluded that the exercise of personal jurisdiction over the Canadian defendants, based on their "meager contacts" with the United States, would fall short of the requirements of due process. Pet. App. 18a. Consolidated offers no persuasive rationale for this Court to reconsider the essentially factual determinations of the court of appeals. The Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). This is surely not the occasion to relax that wise restraint.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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